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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 IN THE MATTER OF:

8 PETITION TO AMEND ER 8.4,
9 RULE 42, ARIZONA RULES OF
10 THE SUPREME COURT
11
12

Supreme Court No. R-10-0031

**Comment to Petition to Amend ER 8.4,
Rule 42, Arizona Rules of the Supreme
Court**

13 The undersigned attorneys hereby comment to the Petition to Amend ER
14 8.4, Rule 42, Arizona Rules of the Supreme Court. The State Bar of Arizona has
15 petitioned this Court to amend ER 8.4, Rule 42, Arizona Rules of the Supreme
16 Court, with the following language: “It is professional misconduct for a lawyer to
17 knowingly manifest bias or prejudice based upon race, gender, religion, national
18 origin, disability, age, sexual orientation, gender identity or expression, or
19 socioeconomic status in the course of representing a client when such actions are
20 prejudicial to the administration of justice; provided, however, this does not
21 preclude legitimate advocacy when such classification is an issue in the
22 proceeding.”

23 We oppose this proposal, in particular, because of the concerns, which we
24 explain below, that accompany the inclusion of the phrase “gender identity and
25 expression.” Above all, enshrining that concept as a protected classification under
26 the law would effectuate a considerable change in legal policy and thus should be
left to the Arizona Legislature (rather than this Court).

1 To begin with, codifying the concept of “gender identity and expression”
2 would bring about a significant shift in the legal understanding of maleness and
3 femaleness. Federal and Arizona law, particularly nondiscrimination law,
4 currently determines a person’s status as male or female on the basis of sex. *See*
5 42 U.S.C. § 2000e-2 (“It shall be an unlawful employment practice for an
6 employer . . . to fail or refuse to hire or to discharge any individual, or otherwise
7 to discriminate against any individual with respect to his compensation, terms,
8 conditions, or privileges of employment, because of such individual’s . . . sex”);
9 Ariz. Rev. Stat. § 41-1402(8) (discussing “the elimination of discrimination”
10 “because of race, color, religion, sex, age, disability, familial status or national
11 origin”). Sex is determined by a person’s biology and anatomy. Shuvo Ghosh,
12 *Sexuality, Gender Identity, eMedicine, available at*
13 <http://emedicine.medscape.com/article/917990-overview> (last visited Jan. 10,
14 2011) (“Sex . . . is defined by the gonads, or potential gonads, either
15 phenotypically or genotypically.”). It is an objectively verifiable characteristic
16 that is familiar throughout the legal system.

17 The proposed rule, however, seeks to alter the existing legal regime with
18 the novel concept of “gender identity and expression.” That concept, unlike sex,
19 is determined by a person’s subjective “conception of oneself” as “male, female,
20 or intersex.” *Id.* It is an internally conceived and objectively unverifiable
21 characteristic without firm legal foundation. The “gender expression” component
22 of the proposed rule is particularly far reaching, for it includes not only a person’s
23 internal conceptions of himself or herself, but also any steps that he or she might
24 take to express externally those internal feelings.

25 Placing “gender identity and expression” in the law, as the proposed rule
26 attempts to do, thus approves the notion that people can self-determine whether

1 they will identify as male or female. See Taylor Flynn, *Transforming the Debate:*
2 *Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual*
3 *Orientation Equality*, 101 Colum. L. Rev. 392, 395-96 (2001) (noting that one
4 goal of the recent push for the law to embrace the concept of gender identity is to
5 “encourag[e] courts and society to conclude that the determination of one’s sex
6 should rest with the individual and not the state”). And more troublesome still,
7 embracing this concept would not only allow all individuals to self-determine
8 whether they are male or female, it would also give them the right to “identify as
9 any combination of gender identity referents simultaneously or identify
10 differently in different contexts or communities.” Laura K. Langley, *Self-*
11 *Determination in a Gender Fundamentalist State: Toward Legal Liberation of*
12 *Transgender Identities*, 12 Tex. J. C.L. & C.R. 101, 104 (2006). Simply put,
13 approving this change would radically alter the law’s—and, in turn, society’s—
14 view of maleness and femaleness, by transforming a person’s status as male or
15 female from a settled reality determined by biology to a preference determined by
16 internal reflection and external “expression.” Without question, if the law is
17 going to embrace this sea change in the legal understanding of maleness and
18 femaleness, that change should come through the Legislature (not through a court-
19 mandated change in the ethical rules of attorneys).

20 Furthermore, it is scarcely clear from this vague proposal what exactly is
21 protected under the “gender identity and expression” concept, but it may be that
22 the State Bar intends to protect a subset of persons who suffer from a psychiatric
23 disorder known as Gender Identity Disorder (“GID”).¹ GID is a mental illness

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25 ¹ See generally Shannon Minter, *Representing Transsexual Clients: Selected Legal*
26 *Issues*, National Center for Lesbian Rights (2003), available at
<http://www.transgenderlaw.org/resources/translaw.htm> (last visited Jan. 13, 2011)
 (“Transsexualism is technically classified as a specific form of a broader psychiatric
 disorder termed ‘gender identity disorder,’ also known as ‘gender dysphoria.’”).

1 causing people to experience significant discomfort with their biological sex that
2 is recognized by the American Psychiatric Association in its Diagnostic and
3 Statistical Manual of Mental Disorders. *See* American Psychiatric Association,
4 Diagnostic and Statistical Manual of Mental Disorders IV (1994).² If that is the
5 aim of including this language, then the proposal should specify its limitation to
6 those who are professionally diagnosed with the condition and are pursuing
7 appropriate treatment. Failing to reasonably confine the “gender identity and
8 expression” language leaves the proposed rule’s scope virtually boundless.

9 Additionally, the proposal’s inclusion of “gender identity and expression”
10 subjects attorneys to difficult-to-decipher and at times conflicting obligations. A
11 person’s internal perceptions and external expressions of gender are not readily
12 determinable and can be quite fluid. In the case, for example, of the client who
13 fluctuates between male and female self-perceptions, the attorney might misjudge
14 the client’s expectations for how he or she is to be perceived and thus engage in
15 conduct that some might characterize as “manifest[ing] bias or prejudice” based
16 on “gender identity and expression.” Quite simply, it is unfair to expose attorneys
17 to discipline based on this novel concept that is subjectively determined, has no
18 objectively verifiable characteristics, has the potential to vary, and has no legal
19 consensus as to its meaning.

20 Finally, we highlight what is plain from the Bar’s submitted materials—that
21 adding the “gender identity and expression” concept to attorney ethical rules is
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23 ² GID often is treated with early administered psychotherapy that encourages
24 acceptance of one’s biological sex. *See Gender Identity Disorder*, Encyclopedia of
25 Mental Disorders, available at [http://www.minddisorders.com/Flu-Inv/Gender-identity-](http://www.minddisorders.com/Flu-Inv/Gender-identity-disorder.html)
26 [disorder.html](http://www.minddisorders.com/Flu-Inv/Gender-identity-disorder.html) (last visited Jan. 13, 2011) (“One common form of treatment for gender
identity disorder is psychotherapy. The earlier the intervention, the greater likelihood of
success. . . . The initial aim of treatment is to help individuals function in their biologic
sex roles to the greatest degree possible.”); *Gender Identity Disorder*, AtHealth, available
at <http://www.athealth.com/Consumer/disorders/GenderIden.html> (last visited Jan. 13,
2011) (similar).

1 *unprecedented.* Indeed, *none* of the 24 non-Arizona jurisdictions cited in
2 Appendix “C” of the Bar’s petition contains “gender identity” or “gender
3 expression” in either their ethical rules or comments.

4 **CONCLUSION**

5 For the foregoing reasons, the undersigned attorneys oppose the State Bar’s
6 proposed amendments to the Arizona Rules of the Supreme Court.

7 Respectfully submitted this 1st day of November, 2011.

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Electronic copy filed with the Clerk
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